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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1978

Case No. 78-1004

DAVID L. HEILMAN and E-C TAPE SERVICE, INC., a Wisconsin Corporation,

Petitioners,

vs.

GRIFFIN B. BELL, Attorney General of the United States of America, his agents, servants, employees, attorneys, successors and all those persons in active concert or participation with them,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

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OCTOBER TERM, 1978

Case No. .....

DAVID L. HEILMAN and E-C TAPE SERVICE, INC., a Wisconsin Corporation,

Petitioners,

vs.

GRIFFIN B. BELL, Attorney General of the United States of America, his agents, servants, employees, attorneys, successors and all those persons in active concert or participation with them,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is the petition of David L. Heilman and E-C Tape Service, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

Opinions Delivered in Courts Below

The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 434 F. Supp. 564 (E.D. Wis. 1977); it also is printed in the appendix to this petition at App. 122. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been reported; it is printed in the appendix to this petition at App. 131. The order of the Court of Appeals denying a Petition for Rehearing En Banc is printed at App. 141.

Jurisdictional Statement

The opinion, order and judgment of the Seventh Circuit Court of Appeals sought to be reviewed were dated and entered September 6, 1978. (App. 140.) The petition of David L. Heilman and E-C Tape Service, Inc. for a rehearing of said opinion, order and judgment was filed with the Court of Appeals September 20, 1978; the order denying said petition was dated and entered October 5, 1978. (App. 141.) The judgment of the Court of Appeals in this case is a final judgment. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1).

Questions Presented for Review

Did the copyright law, and in particular 17 U.S.C. sec. 1(e), prior to its amendment by Congress in 1971, extend a copyright protection to sound recordings by way of granting control over such recordings to the owners of composition copyrights?

Did the copyright law, and in particular 17 U.S.C. secs. 1(e) and 101(e), prior to their amendment by Congress in 1976, effective as of 1978, make the unauthorized duplication of sound recordings made before February 15, 1972, a crime?

Constitutional Provisions and Statutes Involved

This case concerns the interpretation and application of 17 U.S.C. secs. 1(e), 101(e) and 104 (as amended Oct. 15, 1971). The ruling of the Circuit Court of Appeals below, as it relates to the criminal prosecution of David Heilman, involves the prohibition against ex post facto laws and constitutionally secured due process of law, U.S. Const art. I, sec. 9 and amend. V. These statutory and constitutional provisions are printed in the Addendum to this Petition for Writ of Certiorari.

Statement of the Case

A. *Nature of This Case.*

This is a copyright case. David L. Heilman and E-C Tape Service, Inc., the corporation of which he was president, were engaged in the business of producing and marketing anthologies of selections from popular musical recordings made before February 15, 1972.

Prior to commencement of the litigation at hand the Attorney General threatened to prosecute Heilman and E-C Tape for willful infringement of copyrights in violation of 17 U.S.C. secs. 1(e), 101(e) and 104. Heilman and E-C Tape sought a declaratory judgment that their activities did not constitute a violation of the copyright laws, and injunctive relief against the Attorney General.

Initially, the District Court denied Heilman and E-C Tape's motion for a temporary restraining order, preliminary injunction and three-judge court. *Heilman v. Levi*, 391 F. Supp. 1106 (E.D. Wis. 1975). Both parties then made motions for summary judgment. While these motions were pending, the Attorney General instituted criminal proceedings against Heilman in the Northern District of Illinois. *United States v. Heilman*, Case No. 77-CR-323 (N.D. Ill., filed Mar. 31, 1977). Thereafter, the District Court for the Eastern District of Wisconsin denied Heilman and E-C Tape's motion, granted the Attorney General's motion and dismissed the action on its merits. *Heilman v. Bell*, 434 F. Supp. 564 (E.D. Wis. 1977). The Court of Appeals for the Seventh Circuit affirmed this ruling. Case No. 77-1968 (7th Cir. Sept. 6, 1978).

B. *Statement of the Facts.*

The facts of the case, as set forth in the Affidavits of David L. Heilman (App. 110-113, 116-121), are not disputed. David Heilman is a businessman and was president of E-C Tape Service, Inc., until April, 1976.

The recording industry in which he was involved is controlled principally by large record companies. (App. 112, 119.) Each large recording company owns one or more publishing companies. These publishing companies in turn own the copyrights on numerous compositions. In addition, the recording companies own contracts with recording artists. Typically these contracts provide that all the costs of record production, except for the cost of record pressing (32 to 37 cents per album), are charged against the royalties payable to the artists. In addition, the unrecovered costs of one record can be, and frequently are, charged against the royalties of any subsequent record. These contracts typically last for seven years. (App. 112-113.) By these methods the major recording companies have gained control over 80% of the major copyrights of musical compositions. (App. 118-119.)

E-C Tape was engaged in the business of producing and marketing original anthologies of recorded music. In producing these anthologies only music that was recorded or "fixed" prior to February 15, 1972, was utilized. These recordings were based on *compositions* protected by the copyright laws. With respect to all such copyrights Heilman and E-C Tape tendered the two cents per copy royalty in compliance with 17 U.S.C. sec. 1(e). Some 27 copyright holders accepted the royalty payments; 127 others refused to accept the payments. (App. 111-112, 116-117.)

The anthologies were produced and marketed on the basis of the appeal generated by their original and unique themes and formats. A theme was conceived for which there was an adequate market. Records and tapes containing the desired selections were obtained. The selections were duplicated and recorded in the new format, sequence and combination. The anthologies produced in this manner were subject to the copyrights owned by E-C Tape pursuant to 17 U.S.C. sec. 7. The anthologies were then marketed as reel-to-reel tapes, cassettes, 8-track tapes and records, at prices about equal to that of the original recordings. The anthologies often presented selections in a medium, such as 8-track tape recording, in which they were not otherwise available; some were not available in any other form. (App. 111, 117.)

Prior to entering into this business activity Heilman sought the advice of counsel concerning its legality. All of the attorneys he consulted advised him that, if he paid or tendered payment of the compulsory license fee or royalty provided for at 17 U.S.C. sec. 1(e), to the composition copyright owner, his duplication of musical recordings would not be in violation of the copyright law. (App. 117.)

Thereafter, in October, 1971, Congress amended the copyright law and for the first time created a copyright interest in the sound recordings themselves. This amendment was effective as of February 15, 1972. Pub L. 92-140, 85 Stat. 391 (Oct. 15, 1971). In addition and at the same time, Congress made the unauthorized duplication of *copyrighted* recordings fixed after February 15, 1972, a crime, and, further, made "criminal sanction immediately available to prevent piracy of already existing recordings of copyrighted musical works *where the pirate does not*

pay the statutory royalty to the holder of the musical copyright". H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. 9 (1971) (emphasis added).

After passage of Pub. L. 92-140 Heilman again sought the advice of legal counsel, who advised him that sound recordings made or "fixed" prior to February 15, 1972, had not been afforded copyright protection by Pub. L. 92-140, and that, provided the statutory royalty was paid or tendered, the duplication of such recordings was not unlawful. The Criminal Division of the United States Justice Department was of the same opinion, publishing in April, 1973, a pamphlet entitled "Copyright Protection of Sound Recordings", in which it declared that the unauthorized duplication of sound recordings "fixed" prior to February 15, 1972, was not unlawful. (App. 117-118.)

At about the same time this United States Supreme Court reviewed 17 U.S.C. sec. 1(e), as amended, to determine whether or not Congress had pre-empted state legislation granting copyright protection to sound recordings fixed prior to February 15, 1972. The Court concluded there was no federal copyright protection for such recordings and, therefore, the state law in question was proper. *Goldstein v. California*, 412 U.S. 546, 568, 571 (1973). In reaching this conclusion the Court discussed the extent of the *composition copyright* interest and determined that "composers were to have *no control* over the *recordings* themselves". Id. at 566 (emphasis added).

Subsequently, on September 3, 1976, Congress, once again amending 17 U.S.C. sec. 1(e), Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976), for the first time expressed an understanding that the unauthorized duplication of sound

recordings "fixed" prior to February 15, 1972, might not have been lawful. Stating that its 1976 amendments dealt with "three *doubtful* questions under the *present law*", it went on to say as follows:

> "The basic intent of this sentence is to *make clear* that a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3rd, 5th, 9th and 10th Circuits . . . ." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 107-108 (1976) (emphasis added).

This clarification came too late for David Heilman.

On March 31, 1977, a criminal indictment was filed against him in the Northern District of Illinois. This indictment alleged that when David Heilman, two years earlier, on May 15, 1975, duplicated certain sound recordings that had been fixed prior to February 15, 1972, he had committed a criminal act, notwithstanding that he had paid or tendered payment of the compulsory royalty or license fee provided for at 17 U.S.C. sec. 1(e). This prosecution presently is pending in the United States District Court for the Northern District of Illinois. *United States v. Heilman*, Case No. 77-CR-323.

Reasons for Allowance of the Writ

INTRODUCTION

In 1971 Congress amended 17 U.S.C. sec. 1(e), effective as of February 15, 1972. With this amendment copyright protection, for the first time, was extended to sound recordings themselves. At the same time, the duplication of recordings in violation of the copyright law, that is, those "fixed" after February 15, 1972, H.R. Rep. No. 92-487 at 9, was made a crime. Pub. L. 92-140.

In 1976 Congress again amended 17 U.S.C. sec. 1(e). This time, effective as of January 1, 1978 dealing with "three doubtful questions under the present law", Congress made "clear" that an "unauthorized duplication of a musical sound recording originally developed and produced by another", regardless of when the recording was fixed, H.R. Rep. No. 94-1476, is unlawful. Pub. L. 94-553.

Poor Congress! All of its effort was unnecessary. Four Circuit Courts of Appeal, now joined by the Court of Appeals for the Seventh Circuit in the case at hand, already had effected these changes in the copyright law. *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir. 1975), cert denied, 423 U.S. 841 (1975); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3rd Cir. 1975), cert. denied, 421 U.S. 1012 (1975); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, aff'd on rehearing en banc, 497 F.2d 292 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972), cert. denied, 409 U.S. 847 (1972).

I. "THE RICH GET RICHER . . ." (THE EFFECT OF THE CIRCUIT COURT DECISION IN QUESTION IS TO CREATE THE CONDITIONS FOR AN ILLEGAL TYING ARRANGEMENT AND TO DEPRIVE THE PUBLIC OF FREE ACCESS TO THE RECORDINGS OF DECEASED OR NO LONGER "POPULAR" ARTISTS).

A. The ruling of the Circuit Court of Appeals in this case was illogical and would tend to deprive the public of free access to the recordings of its choice.

Notwithstanding the lack of any statutory basis for it, the Courts in these cases ruled that the duplication of a recording of an original licensee is not a "similar use" of the underlying musical composition, as that term is used relative to the compulsory license provisions of 17 U.S.C. sec. 1(e). Accordingly, such a duplication of the original recording, if done without the permission of the composition copyright holder, would be an unauthorized use of the composition. The result, of course, was a copyright control over sound recordings, granted to the composition copyright owner!

A total of 24 district court and court of appeals judges now have passed on this issue. Nine have dissented from the conclusion reached by the majority, and with good reason.

Given the majority ruling in these cases, any copyright holder who allowed the recording of a performance of his musical idea could not prevent subsequent recordings using his *composition* and was obliged to accept the statutory royalty. After the original recording, the composition was available at the price of two cents per tape or record. The copyright holder's interest in the *recording*, however, was not so limited.

It was not subject to the compulsory license provision and the copyright holder could withhold the right to use the recording until an acceptable price was tendered. The copyrighted musical creation which the copyright holder either composed or purchased, could be used merely by paying the copyright holder two cents per copy, but the recording produced and performed by the copyright holder's licensee could not be used without first paying that holder of the composition copyright for the release of the cause of action created by the Circuit Court decisions in question. Although the copyright holder may have had no involvement in the expense or artistic contribution involved in producing, performing or engineering a recording, it is he who had a cause of action against anyone using the recording without his permission.

The absurdity of this is most apparent when the recordings of performances by deceased artists are considered. Suppose a party wished to reissue or duplicate a recording of a deceased artist, say Bing Crosby or Judy Garland, that had been fixed before February 15, 1972. The recording company, in its own right, could not prevent the reissue, because its interest in the recording could have no copyright protection.The holder of the composition copyright relating to the music utilized in the recording, however, could prevent the reissuance, because the reissuance only could be achieved by duplicating the original recording. The copyright holder could, of course, release his rights for whatever consideration he chose to demand. The

copyright holder thus was permitted to appropriate to himself whatever contribution may have been made by the recording company in arranging the recording by the since deceased artist. The recording company had no protection, no rights enforceable against the composer, except for such contractual rights as it may have negotiated with him.[1]

The Seventh Circuit Court of Appeals recognized this anomaly. But it justified its holding nonetheless, rationalizing that it at least "continues to avoid *complete* composer *control* over who may record" (emphasis added). (App. 135.) However, this Supreme Court held that under 17 U.S.C. 1(e) "composers were to have *no control* over the recordings". *Goldstein v. California*, 412 U.S. at 566.

The rationale and ruling of the Circuit Court majority below ½is inconsistent in the determination of this Court. That ruling also is inconsistent with Congress' intent as indicated in the legislative history. H.R. Rep. 2222, 60th Cong., 2d Sess. 6-7, 9 (1909). See *Capitol Records v. Mercury Records Corp.*, 221 F. 2d 657, 660-661 (2nd Cir. 1955); 1 M. NIMMER, NIMMER ON COPYRIGHT 430-434 (1976); B. RINGER, *The Unauthorized Duplication of Sound Recordings*, in 1 STUDIES ON COPYRIGHT 119 (1957).

In addition to being illogical, the ruling of the Circuit Court below is against the public interest. The recording industry is dominated by a few major companies that control access to recordings and recording artists. (App. 112-

[1]The general acceptance in the recording industry of this state of affairs created by the Court of Appeals' decisions was a natural consequence of the fact that the recording companies *own* the publishing companies, which in turn own the composition copyrights. (App. 112-113.)

113, 118-119.) The result? "There is a large body of material there that is pretty well kept out of the public's access." *Hearings on H.R. 2223. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the the Judiciary*, 94th Cong. 1st Sess., ser 36, pt. 3, at 1906 (1975) (testimony of Barbara Ringer, Register of Copyrights). By granting control of recordings to the composition copyright owners, which in turn are controlled by the large recording companies (App. 112-113), the ruling below tends to yet further deprive the public of free access to the recordings of deceased artists or those no longer "popular".

B. The ruling of the Court of Appeals created the conditions for illegal tying arrangements that conflict with the purposes of the Sherman Act.

Every copyright is a small monopoly and an exemption from the anti-trust laws. Such exemptions must be narrowly construed and not implied beyond the letter of the law. *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

The ruling of the Circuit Court created the conditions for classic tying arrangements contrary to the purposes of the Sherman Act. 15 U.S.C. sec. 1. It would permit, almost invite, the large recording companies and their publishing companies and their publishing houses to tie the use of the uncopyrighted product, the recording, to the copyrighted product, the composition. The tying arrangement would be the obvious device to attempt to extend the limited monopoly granted by Congress to other markets. Such arrangements were originally declared illegal under the patent laws and now are held to be *per se* violations of

the anti-trust laws. See., e.g., *Northern Pacific Railway v. United States*, 356 U.S. 1, 5-6 (1958).

II. ". . . AND THE POOR GET POORER" (THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN THIS CASE SUBJECTS DAVID HEILMAN TO THE TENDER MERCIES OF A CRIMINAL PROSECUTION FOR ACTS NOT DECLARED TO BE CRIMINAL BY THE CONGRESS UNTIL AFTER HE HAD DONE THEM).

As it concerns the criminal law, the usual practice is that a legislative body adopts legislation creating a crime, following which the courts strictly construe and apply that law. Indeed, under our system, it is axiomatic that it is the legislature and not the courts that has the power to make acts criminal. E.g., *United States v. McClain*, 545 F.2d 988, 995-996 (5th Cir. 1977). In the case at hand, however, the usual practice has been turned on its head.

Here, relying on ad hoc judicial interpretations of the civil provisions of the copyright law, the legislature has amended that law, including its criminal application, to "make clear" that the courts' construction was correct. Thus the definition of a crime is based on judicial application in a civil context of the term, "similar use".

The result is the criminal prosecution of David Heilman for acts which when they were done had not been declared by Congress to be a crime. Indeed, at best, Congress considered the issue to be "doubtful . . . under the present law". H.R. Rep. No. 94-1476 at 107-108.

In the process, basic rules regarding the construction of criminal statutes — that they are to be strictly construed, e.g., *United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971), that any ambiguity concerning their ambit should be resolved in favor of lenity, e.g., *United States v. Massini*, 565 F. 2d 1297, 1306-1307 (5th Cir. 1978); *United States v. Isaacs*, 493 F.2d 1124, 1147 (7th Cir. 1974), have been ignored. Under our system, a man is not supposed to have to guess, at his peril, which interpretation of a criminal statute is the correct one. To require him to do so, as happened here, has the same effect as an ex post facto law and constitutes a denial of due process of law, in violation of U.S. Const. art. I, sec. 9 and amend. V.

Under these circumstances, where Congress itself did not "make clear" its intent regarding a "doubtful" question of copyright law until after David Heilman had done the acts which now are alleged to justify a criminal prosecution, he should not be required to endure a criminal trial in order to prove his lack of criminal intent. In this case, where even the Criminal Division of the Justice Department at one time agreed with his reading of the law (App. 117-118), judicial interpretations of statutory language in a civil setting should not be grafted onto a criminal statute to make criminal acts which at the time they were done were not considered by Congress to be criminal.

CONCLUSION

The ruling of the Court of Appeals for the Seventh Circuit in this case, as it concerns sound recordings fixed prior to February 15, 1972, is inconsistent with the legislative history, H.R. Rep. No. 92-487 at 9, contrary to this Court's determination in *Goldstein v. California*, 412 U.S. at 566, that composition copyright holders were to have

"no control" over the recordings themselves, and is bad public policy because it entrenches the large recording companies in their dominant market position and deprives the public of free access to music of its own choosing.

More importantly, as it concerns David Heilman the individual, that ruling requires him to face a criminal prosecution for acts that were not considered criminal at the time they were done. For these reasons it is asked that the Supreme Court of the United States grant this petition for writ of certiorari.

Respectfully Submitted,

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ADDENDUM

UNITED SSTATES CONSTITUTION

ARTICLE I. SECTION 9. CLAUSE 3

No Bill of Attainder or ex post facto Law shall be passed.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Public Law 92-140
92nd Congress, S. 646
October 15, 1971

An Act

To amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code is amended in the following respects:

Sound recordings. Copyright. Limitations. 61 Stat. 652; 66 Stat. 752.

(a) In section 1, title 17, of the United States Code, add a subsection (f) to read:

"To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use."

(b) In section 5, title 17, of the United States Code, add a subsection (n) to read:

"Sound recordings."

Copyright notice, form. 68 Stat. 1032.

(c) In section 19, title 17, of the United States Code, add the following at the end of the section: "In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol Ⓟ (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: *Provided*, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice."

Notice, location.

(d) In section 20, title 17, of the United States Code, amend the first sentence to read: "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright."

Definitions.

(e) In section 26, title 17, of the United States Code, add the following at the end of the section: "For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds

Supra.

other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts

of instruments serving to reproduce mechanically the musical work', 'mechanical reproductions', and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in sections 1(e) and 101(e) of this title."

61 Stat. 652. 17 USC 1. Infra.

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

Copyrighted music, unauthorized use. 61 Stat. 661.

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice."

Notice.

Effective dates.

SEC. 3. This Act shall take effect four months after its enactment except that section 2 of this Act shall take effect immediately upon its enactment. The provisions of title 17, United States Code, as amended by section 1 of this Act, shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act and before January 1, 1975, and nothing in title 17, United States Code, as amended by section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act.

Approved October 15, 1971.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-487 (Comm. on the Judiciary).
SENATE REPORT No. 92-72 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 117 (1971):
Apr. 29, considered and passed Senate.
Oct. 4, considered and passed House, amended.
Oct. 6, Senate agreed to House amendments.

TITLE 17 UNITED STATES CODE
COPYRIGHTS
(AS AMENDED OCTOBER 15, 1971)

§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically

the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording

in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

. . . .

(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.

. . . .

§ 104. Willful infringement for profit

Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine of not less than $100 nor more than $1,000, or both, in the discretion of the court: *Provided, however*, That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit. July 30, 1947, c. 391, § 1, 61 Stat. 652.